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Glenn's Trucking Co., Inc. and United Mine Workers of America. Case 9-CA-35666

March 21, 2005

**SUPPLEMENTAL DECISION AND ORDER
REMANDING**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On September 25, 2003, Administrative Law Judge Lawrence Cullen issued the attached supplemental decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings, and conclusions as modified and to adopt the recommended Order as modified.

In this compliance proceeding, the judge concluded that the compliance specification accurately set forth the backpay due the named discriminatees.² We adopt the judge's supplemental decision in all respects except that we shall modify the cutoff date for the backpay due discriminatee Michael Hayes.

Backpay Period for Michael Hayes

The judge concluded that discriminatee Hayes was entitled to backpay for the entire backpay period ending September 3, 1998 (the date the Respondent offered Hayes reinstatement). He rejected, as unsupported by the evidence, the Respondent's contention that Hayes' entitlement to backpay should be tolled no later than November 22, 1997.

The Respondent excepts, alleging that the date of Hayes' disabling stroke was November 22, 1997, and that his backpay should therefore be tolled as of that date. In the alternative, the Respondent submits that Hayes failed to mitigate damages. We do not pass on the

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In the underlying case, the Board found that the Respondent violated Sec. 8(a)(3) and (1) by delaying the employment of, or denying employment to, 23 named discriminatees. See *Glenn's Trucking Co., Inc.*, 332 NLRB 880 (2000), *enfd.* 298 F.3d 502 (6th Cir. 2002).

Respondent's former contention, but we agree with its alternative claim.

As more fully discussed by the judge, Hayes initially told the Region's compliance officer that his stroke occurred on November 22, 1997, but he later reported that he believed his stroke occurred on November 22, 1999. The Respondent submits that the evidence supports a finding that Hayes' stroke occurred on the earlier date, but the judge found to the contrary. However, we need not resolve the dispute regarding the date of Hayes' disability. In the hearing, the Respondent adduced testimony from the Board's compliance officer that Hayes filed four applications for employment between August and October 1997, and none thereafter.

A discriminatee is entitled to backpay if he makes a reasonably diligent effort to obtain substantially equivalent employment. See *Moran Painting, Inc.* 330 NLRB 376 (1999). However, a discriminatee's search for work must be more than sporadic. *Id.* at 376. Here, there is no evidence that Hayes made any effort to seek employment after October 1997. Therefore, we find that the Respondent has satisfied its burden of establishing that Hayes failed to exercise reasonable diligence in searching for work after October 1997, and thus Hayes failed to mitigate damages after that date. See *Moran Painting*, *supra* (employee Dixon). Accordingly, we find that backpay for Hayes is tolled as of October 31, 1997.

ORDER

The National Labor Relations Board adopts the recommended Supplemental Order of the administrative law judge as modified herein and orders that the Respondent, Glenn's Trucking Co., Inc., Hazard, Kentucky, its officers, agents, successors, and assigns shall satisfy the obligation to make whole the following discriminatees by paying them the following amounts, together with interest thereon accrued to the date of payment computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax and withholdings required by Federal and State laws.

Reed Brewer	\$ 2,626
Kermit Campbell	\$ 9,205
Clyde David Cockrell	\$ 9,963
John M. Fugate	\$ 13,490
Spencer Godsey	\$ 8,315
James H. Haddix	\$ 2,866
Tommy Hurley	\$ 16,416
Destry Mullins	\$ 166
Ray Napier	\$ 377
Raymond Robinson	\$ 2,903
James Larry Stacy	\$ 10,062
Kenneth Williams	\$ 0

Douglas E. Bush Jr.	\$ 756
Charles Caudill	\$ 10,919
Mike Combs	\$ 10,073
Roy Gayheart	\$ 253
Harold Guerra	\$ 14,775
Danny W. Lovins	\$ 14,355
Grover Napier	\$ 8,799
Jerry Noble	\$ 3,417
Leander Ronk	\$ 377
Donnie Strong	\$ 7,370
TOTAL:	\$147,483

IT IS FURTHER ORDERED that this case is remanded to Region 9 for the limited purpose of recalculating the backpay award for Michael Hayes consistent with this Supplemental Decision and Order Remanding.

Dated, Washington, D.C. March 21, 2005

Robert J. Battista ,	Chairman
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Wilma B. Liebman,	Member
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Peter C. Schaumber,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

Eric J. Gill, Esq., for the General Counsel.

George J. Miller, Esq. for the Respondent.

Charles H. Dixon, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This backpay case was heard before me on July 15, 2003, in Hazard, Kentucky. This case arises from a decision issued by the National Labor Relations Board (the Board) on October 25, 2000, (*Glenn's Trucking Co.*, 332 NLRB 880 (2000)), and affirmed by the United States Court of Appeals, Sixth Circuit on May 23, 2002 (*Glenn's Trucking Co. v. National Labor Relations Board*, Nos. 99-2358; 01-1053). The Board held and the Court affirmed that Respondent Glenn's Trucking Co., Inc., violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by failing to hire employees who were listed on a preferential hiring list presented to Respondent by the United Mine Workers of America after Respondent was awarded a coal hauling contract by Cypress Mountain Coal Corporation. The Board held that the General Counsel met its evidentiary burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982), with respect to Respondent's refusal to hire or delay in hiring, the named

discriminatees for the *Starfire Mine* as set out in the Board's and the administrative law judge's decision. The Board further concluded that Respondent failed to satisfy its *Wright Line* burden by showing that it would not have hired the discriminatees or would have delayed in hiring them or offering them jobs, even in the absence of their union sympathies. *FES*, 331 NLRB 9, 12 (2000).

Applicable Legal Principles for Backpay Cases

See *Minette Mills Inc.*, 316 NLRB 1009, 1010-1011 (1995). When loss of backpay is caused by a violation of the Act, a finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *Arlington Hotel Co.*, 287 NLRB 851, 855 (1987), enfd. on point 876 F.2d 678 (8th Cir. 1989). With regard to the end of the backpay period an offer of reinstatement "must be unequivocal, specific and unconditional" *A-1 Schmidlin Plumbing & Heating Co.*, 312 NLRB 191 (1993). In compliance proceedings General Counsel bears the burden of proving the amount of gross backpay due. *Florida Tile Co.*, 310 NLRB 609 (1993). The General Counsel has discretion in selecting a formula which will closely approximate the amount due. The General Counsel is not required to determine the exact amount due or to adopt a different and equally valid formula which may yield a somewhat different result. *NLRB v. Overseas Motors*, 818 F.2d 517 (6th Cir. 1987). The administrative law judge in a compliance proceeding may recommend a different method to the Board than the one asserted by the General Counsel when a more accurate method is established in the record. *Frank Mascali Construction*, 289 NLRB 1155, 1157 (1988). The burden is on the employer who committed the unfair labor practice to establish facts that reduce the amount due for gross backpay. *Florida Tile*, supra. The burden of showing any interim earnings or a willful loss of interim earnings falls to the employer. *Arlington Hotel*, supra. However, the General Counsel has a voluntary policy to assist in gathering this information and including it in the compliance specification, *Florida Tile*, supra. Interim employment means comparable work (substantially equivalent employment). A discriminatee's obligation to mitigate backpay is to assert a reasonable standard of diligence in seeking employment *Florida Tile*, supra. In backpay cases the Board adheres to the standard that any doubts must be resolved against the wrongdoer whose violation of the Act was the cause of the uncertainty. *Intermountain Rural Electric Assn.*, 317 NLRB 588 (1995).

In his opening statement the General Counsel noted that the backpay specification lists 23 named discriminatees and sets out the gross backpay for each discriminatee as well as the net backpay. He also contended that all attempts by Respondent to raise issues not related to the derivation of backpay liability that have already been litigated in the underlying case must be rejected. He contends that the date of the commencement of liability for calculating backpay has already been fully litigated in the underlying trial.

In his opening statement Respondent's counsel contended there are three and possibly four issues to be litigated in this case. The first is the duration of the backpay period for each discriminatee which issue he contended was not decided by the

Board as reflected in the last paragraph of the circuit court opinion where the court stated, "The exact start date for the backpay period for each of the discriminatees is yet to be determined at a compliance proceeding. Based upon the General Counsel's representation that July 26, 1997, is simply the earliest date from which backpay can accrue, we find no error in the Administrative Law Judge's determination." From this Respondent's counsel concludes that the backpay period has not been decided and is yet to be decided at this hearing. Respondent's counsel contends the method of computing the gross backpay used by the General Counsel is too complicated and that under Board policy as set forth in the Board Case Handling Manual, there is an easier, different way to do it. A third possible issue may be the accuracy of the calculations. A fourth issue raised as an affirmative defense is the failure of discriminatee Mike Hayes to mitigate damages which Respondent's counsel contended he will rely on cross-examination to establish as he did not foresee that he would offer any proof of the alleged failure to mitigate in his case in chief. Respondent's posthearing Exhibits 7 and 8 are received in evidence.

The General Counsel's Case

In support of its case the General Counsel called as a witness John Grove, the compliance officer Region 9 of the Board, who identified the compliance specification and underlying documentation. He testified at length as to how he had prepared the compliance specification, including the methodology used and the basis for the establishment of the parameters of the backpay period and the arrival at the gross backpay and net backpay for each of the discriminatees. He also testified concerning information regarding the various discriminatees' availability for work during the backpay period.

The backpay specification lists 23 discriminatees and their gross backpay, interim earnings, and net backpay owed them. The specification defines the starting date for backpay calculations as August 10, 1997, which is the date by which Respondent had hired a sufficient number of employees that, absent discrimination, all of the discriminatees would have been hired. The administrative law judge in the underlying case found:

... respondent (in August 1997) hired 28 employees; 6 of these were former Leatherwood employees, but 22 were not; of these 22 non-Leatherwood employees, only 1 employee whose name appeared on the Union's 'Preferential Hiring List' (Durham) was hired. Respondent has emphasized that it rejected 100 applicants in addition to the 100 other rejected applicants that applied in August, or before. In fact, Baker's secretary Hall testified that she could find no rejected applications that were filed in the beginning of operations, other than those of the alleged discriminatees. Therefore, the August figures alone are evidence of a discriminatory motive . . .

By the week of August 10, 1997, Respondent had hired enough employees for drivers' jobs that all of the discriminatees would have been hired to perform, absent discrimination. During the week of August 10, 1997, Respondent had employed at least 36 employees to drive trucks. In this case Respondent's Exhibit 2 was received in evidence but was not submitted at the underlying hearing. It shows that Respondent

hired a sufficient number of employees during August 1997, that the discriminatees could have been hired. General Counsel notes that although the hire dates indicated in Respondent's Exhibit 2 were spread through August 1997, most of the employees listed on the document are shown to have been hired in the beginning and middle of August 1997, and that several of the employees on this list were hired prior to August 10, 1997, but to formulate the starting date, the determination was made to use August 10, 1997, as the beginning date to remedy the unfair labor practice.

The backpay period ends, as shown on the backpay specification, on September 3, 1998, which was the date Respondent made its offer of reinstatement for the discriminatees. However, there are exceptions for Charles Caudill, whose backpay period ends on January 31, 1998; for Mike Combs, whose backpay period ends on March 9, 1998; for John M. Fugate, whose backpay period ends on March 9, 1998; for Spencer Godsey, whose backpay period ends on December 15, 1998; for Ray Napier, whose backpay period ends on September 8, 1997; for Leander Ronk, whose backpay period ends on September 8, 1997; and for James L. Stacy, whose backpay period ends on January 15, 1998.

Gross backpay was calculated on a quarterly basis. Each quarter has 13 weeks. Seven weeks of the third quarter of 1998, fell within the backpay period. Interim earnings of wages earned by the discriminatees during the backpay period were deducted from their gross backpay to arrive at the net backpay owed to the discriminatees.

The compliance officer used an excel spreadsheet to calculate gross backpay using the quarterly payroll summaries submitted to the Region by the Respondent. For the first quarter of the backpay period gross backpay was based upon the wages of employees who were employed as of August 3, 1997, through the end of the backpay period. For the subsequent quarters, only the wages of employees who were employed in the quarter prior to the indicated quarter and during the quarter after the indicated quarter were used. This was done to include the gross wages of only those employees who were fully employed during the quarter being measured.

Only employees who had earned more than \$1000 in the quarter being measured were used. The compliance officer assumed that employees who earned less than \$1000 during a quarter did not work for part of the quarter because of an injury, illness, or other reason. He used only the wages of employees who had earned the entire quarter to ensure fairness and to avoid skewing the calculations.

The gross backpay for the last quarter in the backpay period, or the third quarter in 1998, was calculated differently. Respondent did not supply the Region with quarterly payroll summaries for that quarter. As a result the compliance officer calculated gross figures for that quarter by computing the median of the highest wages and the lowest wages for the previous quarters in the backpay period. Those wages of employees that fell within the median range were then used to calculate the backpay for the third quarter of 1998. The compliance officer testified that the median wages of the employees who had worked for Respondent during the backpay period rather than the mean wages were used because there were a number of

employees who had only worked for Respondent for a short time. Using a mean wage would thus skew the backpay too low.

At this hearing Respondent attempted to relitigate issues that had been litigated during the underlying trial. Respondent attempted to show it was only interested in hiring truckdrivers who had Class A commercial drivers' licenses and who were "experienced" as tractor trailer drivers. However, the administrative law judge totally rejected Respondent's defense that the discriminatees were not hired because they lacked the qualifications for the positions. He stated, "I have found that all 23 of the alleged discriminatees except Mullins, Ronk, and Ray Napier possessed class A licenses when they applied for work on July 11 or 14, or they secured class-A licenses immediately after they applied, and they did so at Baker's (Respondent's owner's) instructions" The General Counsel contends that this issue has thus been fully litigated and must be rejected, citing *Task Force Security & Investigations*, 323 NLRB 674 fn. 2 (1997), citing *Kidd Electric Co.*, 322 NLRB 33 (1996), as a respondent may not relitigate in a compliance proceeding any matters previously decided in the prior unfair labor practice proceeding.

General Counsel also contends that Respondent's attempt to provide its own "compliance specification" in order to limit its backpay liability should be rejected. Respondent's introduction of alternative methods to derive backpay formula does not prove that the backpay specification prepared by the Board is erroneous or incorrect in any way. The Board's test for fashioning an appropriate backpay formula is that the backpay formula not be arbitrary. The goal of any method for computing backpay remedies is to place the discriminatees in the posture that they were likely to have been in had respondent treated them in a nondiscriminatory manner. To the extent that a reasonable approach to allocating and computing backpay is imprecise, the deficiency is construed against the wrongdoer. *Intermountain Rural Electric Assn.*, supra.

Respondent's Case

Respondent contends in brief that the gross backpay and net backpay for each discriminatee, as shown on Appendix A of the Compliance Specification, as amended at the hearing in this matter is incorrect. Respondent does not dispute the allegations in the Compliance Specification with regard to interim earnings of discriminatees, except for discriminatee Mike Hayes. The compliance officer testified that Hayes told him in an interview that he had suffered a disabling stroke on November 22, 1997. Hayes later called him back and told him that the correct date when he suffered the stroke was November 22, 1999, and he believes Hayes called him back and confirmed this. He testified further that "I am quite certain he checked and called back and reconfirmed that it was '99.'" Respondent also asked the compliance officer on cross-examination whether the unemployment period extending into 1999 was an unusually long period of unemployment warranting "special attention." The compliance officer testified this was not an unusually long period of unemployment and particularly since it was in Hazard, Kentucky. On redirect the compliance officer testified he received a report from Hayes listing four separate employers

where he searched for work. The report also showed that he had registered for work with unemployment services. All the places he applied for work were listed for the period from August to October 1997, with no indication that he made any subsequent efforts to find employment.

Respondent also contends that the correct gross backpay figures are shown on its Exhibit 7 which is its post-hearing exhibit of calculations made by Respondent's paralegal, Sarah Vandergrift, who also testified at the hearing. Under the methodology of this exhibit, the gross backpay figures are attained by assuming that the discriminatees would have filled half of all openings for tandem truckdrivers and would have been hired in order of seniority. In the alternative if the discriminatees were qualified to fill tractor-trailer openings from the time they first applied for work, the Respondent's position is that the discriminatees would have been hired to fill half of all openings for drivers and the correct gross backpay figures are set forth on Respondent's Exhibit 6. Finally, and also in the alternative, if it is found that the discriminatees would have been hired by the week of August 10, 1997, then Respondent's position regarding gross backpay is shown on Respondent's Exhibit 5.

Analysis

I find that the compliance specification as amended at the hearing with respect to Mike Combs prepared by the compliance officer for the calculations of backpay is correct and that the discriminatees should be awarded the sums of backpay as set out in the amended compliance specification plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term Federal rate" for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621. I find no merit to any of the Respondent's defenses in the backpay hearing substantially for the reasons asserted by the General Counsel in his opening statement and brief and under the standards set out in the above-cited case law.

Initially, the discriminatees incurred a loss of backpay caused by Respondent's violation of the Act. *Minette Mills*, supra; *Arlington Hotel*, supra. The end of the backpay period is undisputedly on September 3, 1998, with the exception of certain employees as set out above. *Schmidlin Plumbing*, supra. General Counsel has met his burden of proof of the amount of gross backpay. The General Counsel has properly exercised his discretion by the use of the formula utilized by the compliance officer in calculating backpay in this case. The record supports a finding that the compliance specification and the calculations used to derive the net backpay were not arbitrary but were a reasonable method of arriving at a reasonable approximation of the amounts due the discriminatees. *Florida Tile*, supra, *NLRB v. Overseas Motors*, supra. I do not find that the Respondent has established any facts that would require the acceptance of its version of what the compliance schedule, formula of calculation and backpay should reflect. Respondent has not met its burden of establishing any facts which would or should supersede the Compliance Specification prepared by the compliance officer in this case. *Arlington Hotel*, supra. I find as contended by the General Counsel that much of Respondent's concerns in this case such as its discussion regarding the qualifications of the applicants have been resolved by the administrative law

judge in the underlying case as upheld by the Board and the Sixth Circuit Court of Appeals. Respondent's efforts are merely an attempt to relitigate matters that have been resolved and are not properly a matter to be raised in a compliance hearing. *Florida Tile*, supra.

With respect to the issue of the proper cutoff date of backpay for Michael Hayes, and with respect to Respondent's contention that Hayes did not engage in a meaningful search for work during the backpay period, the Respondent put on no evidence whatsoever to support its position that Hayes' backpay should be cut off in 1997, because of a disabling stroke and that he engaged in a willful loss of interim earnings during the backpay period. It is the Respondent's burden to establish facts that reduce the amount due for gross backpay or a willful loss of earnings. With respect to the proper cutoff date of backpay for Hayes because of his stroke, the Respondent could have subpoenaed medical records or otherwise verified that correct date. Any doubt concerning this date must be resolved against Respondent as the wrongdoer whose unlawful conduct gave rise to the uncertainty. *Florida Tile*, supra.

The applicable backpay as set out in the Compliance Specification as amended at the hearing is as follows:

Reed Brewer	\$ 2,626	Douglas E. Bush Jr.	\$ 756
Kermit Campbell	\$ 9,205	Charles Caudill	\$10,919
Clyde David Cockrell	\$ 9,963	Mike Combs	\$10,073
John M. Fugate	\$13,490	Roy Gayheart	\$ 253
Spencer Godsey	\$ 8,315	Harold Guerra	\$14,775
James H. Haddix	\$ 2,866	Michael Hayes	\$22,909
Tommy Hurley	\$16,416	Danny W. Lovins	\$14,355
Destry Mullins	\$ 166	Grover Napier	\$ 8,799
Ray Napier	\$ 377	Jerry Noble	\$ 3,417

Raymond Robinson	\$ 2,903	Leander Ronk	\$ 377
James Larry Stacy	\$10,062	Donnie Strong	\$ 7,370
Kenneth Williams	\$ 0		

CONCLUSIONS OF LAW

1. The General Counsel has met its burden of establishing the backpay due the discriminatees as set out above.

2. The Respondent has failed to establish that the Compliance Specification as amended at the hearing is incorrect.

3. The Respondent has failed to establish that the calculation of the backpay of Michael Hayes is incorrect because of an improper date for the end of his backpay period as a result of a disabling stroke.

4. The Respondent has failed to establish that Michael Hayes incurred a willful loss of earnings during the backpay period.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Glenn's Trucking Co., Inc., its officers, successors, and assigns shall pay to the discriminatees the amounts set out above opposite their names with interest.

Dated, Washington, D.C. September 25, 2003

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.